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## "Cricket on the Hearth": Edward Douglass White and the Constitution

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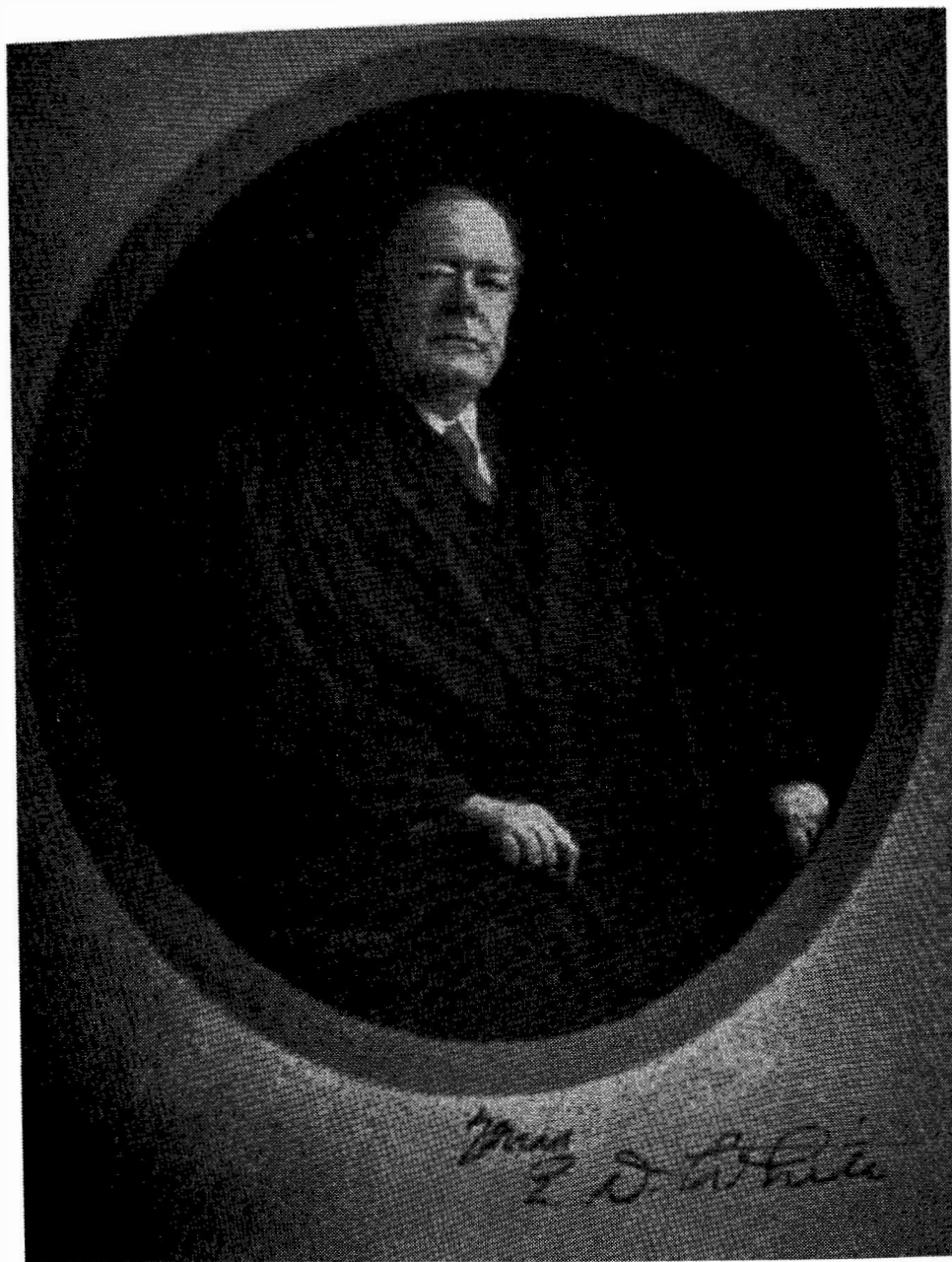
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*Frontispiece,*  
Richard Henry Jesse, CHIEF JUSTICE WHITE,  
XLV American Law Review 321 (1911).

## “CRICKET ON THE HEARTH”: EDWARD DOUGLASS WHITE AND THE CONSTITUTION\*

*Paul R. Baier\*\**

EDITOR'S NOTE: *"I think you know that I support you in all your endeavors," said Supreme Court Justice William J. Brennan, Jr., of Professor Baier's play, "Father Chief Justice": Edward Douglass White and the Constitution,—"but none more so than when you are illuminating the history of the great institution to which I have devoted 40 years of my life." The play premiered March 8 (Holmes's birthday), 1997, to a standing-room only audience in the Theater of the Jean Lafitte National Historic Park in Thibodaux, Louisiana. "Thibodaux is about as far 'off Broadway' as you can get," says playwright Baier. Chief Justice Pascal F. Calogero, Jr., Justice Harry T. Lemmon, Judge Mary Ann Vial Lemmon, all Loyola College of Law alumni, played their signature parts to an overflow crowd of over 400 on Loyola's campus, in Nunemaker Auditorium, on February 4, 2009.*

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\* "Father Chief Justice": Edward Douglass White and the Constitution, A Play by Paul R. Baier, was first published by way of a preview in 58 Louisiana Law Review 423 (1998), featuring the Prologue and Act I, "Portrait and Hearth," Act II, "Soldier Boys," and Act III, "At Home." The A.B.A.'s *Litigation* journal published Act III in its Literary Trials column, Vol. 24, no. 4 (Summer 1998). Act IV, "By the Light of Reason," was published in 6 Loyola Journal of Public Interest Law 1 (2006). Most recently, Aspen Publishers (with thanks to Steve Errick, General Manager, Wolters Kluwer) sponsored a preview of the play in the Louisiana Supreme Court chamber on Twelfth Night, January 6, 2010, printing and distributing a limited Centenary edition of the play in celebration of the Centennial of E. D. White becoming Chief Justice of the United States. The Board of Editors of *Loyola Law Review* is thrilled to publish the last act of the play, Act V, "Cricket on the Hearth," steadfastly withheld by Professor Baier through fourteen years of production and performance, awaiting the Centenary of White taking his seat as Chief Justice, December 19, 1910. The small lighted candle of that date is upon us.

\*\* George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Editor, LIONS UNDER THE THRONE: THE EDWARD DOUGLASS WHITE LECTURES OF CHIEF JUSTICES WARREN E. BURGER AND WILLIAM H. REHNQUIST (Louisiana Bar Foundation, 1995).

*Judge William V. Redmann's knockout performance as Justice Oliver Wendell Holmes in the Old State Capitol Sesquicentennial run of the play, April 29, 2000, Baton Rouge, lingers in many a heart. The title of the play, "Father Chief Justice," is taken from Justice Brandeis's salutation to his new Chief on coming to the Court in 1916. Throughout the drama, Baier links his audience to the stage's happenings as Professor Richard Henry Jesse, who in his day was a close personal friend of E. D. White. Chief Justice Dixon's Foreword sets the stage, and Professor Baier's Introduction and Note on Sources walks you into his creative mind. "You have struck a noble blow for White, C. J., not unlike that struck by Emmet Lavery for White's buddy, Wendell Holmes. It is also one which has been long wanting and in bringing it forth you have done a service for American legal history, for the Court, and for Louisiana." This from John S. Monagan, an accomplished Holmes scholar.*

THE LOYOLA LAW REVIEW is pleased to rekindle Chief Justice White's Great Spirit of the Fireside and of the Hearth for all the Nation's legal and literary family, celebrating the Centenary of White taking the Center Chair as Chief Justice of the United States, 1910-1911.

### FOREWORD

by John A. Dixon, Jr.,  
Chief Justice of Louisiana, Retired

Emmet Lavery's play "*The Magnificent Yankee*" (1945) preserves Justice Holmes of Boston for all the world, and for all time. Arthur Hopkins's production of the play at the Royale Theatre, New York, featuring Louis Calhern's acclaimed performance as O.W.H., Jr., and Mr. Calhern's repeat triumph in the MGM film of the play certainly add life to the *United States Reports*. Holmes is well remembered. Not so his Confederate confrère on the Court, Louisiana's Edward Douglass White, Associate Justice (1894-1910) and Chief Justice (1910-1921) of the Supreme Court of the United States. "*Father Chief Justice*"—this is how Justice Brandeis addressed his Louisiana colleague on the Court—is aimed at rescuing Thibodaux's beloved son E. D. White from the obscurity of forgotten memory. The play, written and directed by Professor Paul R. Baier of the LSU Law Center, is really the joint educational endeavor of the Louisiana Bar Foundation, the United States Civil War Center, and Louisiana Secretary of State W. Fox McKeithen.

"Playwright are you!" said the Court's first woman, Justice Sandra Day O'Connor, as she gave our own Professor Baier a warm welcome to chambers on hearing the news. "I think you know that I support you in all your endeavors," said Justice William J. Brennan, Jr., of Paul's play, "but none more so than when you are illuminating the history of the great institution to which I have devoted 40 years of my life." I distinctly recall Playwright Baier's Oration at the Unveiling of the Rosenthal Portrait of E. D. White before the Louisiana Supreme Court, October 29, 1982. A curious reader will find it preserved in Vol. 43, no. 4 of the *Louisiana Law Review*—what with its facing color photograph of Albert Rosenthal's portrait of Louisiana's "Father Chief Justice" Edward Douglass White.

I gave Paul the oration assignment knowing he would throw all his might into it. He put White's portrait up on an easel and draped it in the National Flag in our courtroom. Golden light and a bucket of red roses highlighted the portrait. We heard the story of Chief Justice White and his enemy in arms, Oliver Wendell Holmes, Jr., exchanging red roses every Constitution Day, September 17th—anniversary of the Battle of Antietam, where Holmes took a Confederate ball through the back of the neck and, by God's grace, lived. With Mr. Baier's play, "*Father Chief Justice*," the magic continues.

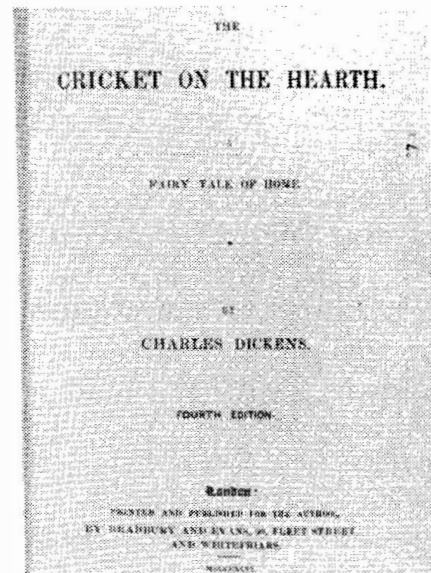
Louisiana hopes by this production to share E. D. White's great Spirit of the Fireside and of the Hearth with her citizens, young and old. And it is a noble thing for the Louisiana Bar Foundation to endorse the play by its sponsorship and to bring it to publication.

"*Father Chief Justice*": Edward Douglass White and the Constitution premiered in the Theater of the Jean Lafitte National Historic Park, Thibodaux, Louisiana, Saturday, March 8, 1997—Holmes's birthday.

—J.A.D., Jr.  
*Fourth of July, 2001*  
SHREVEPORT, LOUISIANA

## INTRODUCTION

When Chief Justice Dixon asked me to unveil White's portrait, I knew very little about Louisiana's E. D. White. True, I teach the Court and the Constitution, and *Geer v. Connecticut*—vintage Centennial—is a favorite White opinion we cover in class. *Geer* had to do with shooting woodcock in Connecticut and the Commerce Clause of the United States Constitution. This is an old case, lately overruled, but E. D. White's large civilian learning on the sovereign's ownership of property in wild animals is evident to all the world. As to the man himself, I knew nothing. Research in the books revealed a spirit in Chief Justice White that I have come to know myself, living in Louisiana. I have in mind the Spirit of the Fireside and of the Hearth canvassed by Dickens in "*Cricket on the Hearth*," a family tale of home. Chief Justice White himself referred to the book when he told of his change of heart towards "Old Glory" at an American Bar Ass'n gathering in Washington, D.C., celebrating White's twentieth anniversary on the Supreme Court. This was at the start of the October Term 1914. There is a passage in the book that, to my eye, portrays the essence of Louisiana's "Father Chief Justice" E. D. White:



And all was Caleb's doing; all the doing of her simple father! But he too had a Cricket on his Hearth . . . . For all the Cricket Tribe are potent Spirits, even though the people who hold converse with them do not know it (which is frequently the case); and there are not in the Unseen World, Voices more gentle and more true; that may be so implicitly relied on, or that are so certain to give none but the tenderest counsel; as the Voices in which the Spirits of the Fireside and the Hearth, address themselves to human kind.

*"Father Chief Justice"* we hope will communicate to its audience the "invisible 'plus'" about White that Chief Justice Rehnquist identified in his Edward Douglass White Lectures at the LSU Law Center. Holmes, Hughes, and Frankfurter recognized it in their day. Like Professor Jesse of our play, I think it important to rekindle the flame for all of Louisiana's and the Nation's citizens—and for those who are to come. The characters of the play are as real as the written word, molded bronze, and portraiture allow. Throughout the drama I use the actual words spoken by these large historic figures—their judicial opinions and letters to friends primarily—sculpting them into a stage production of manageable proportion. A Note of Sources is appended as a sort of verification and select bibliography.

By way of special effects, Chief Justice White, Oliver Wendell Holmes, Jr., and Louis D. Brandeis make a joint appearance themselves—"live and in person," so to speak—on the stage of *"Father Chief Justice."* I mean the magic of National Archives Universal Newsreels, radio clips, and a lively photo album of these courtly players.

—P.R.B.  
*Constitution Day,*  
September 17, 2010  
BATON ROUGE, LOUISIANA

## ACT V. CRICKET ON THE HEARTH.

THE CRICKET ON THE HEARTH: A FAIRY TALE OF HOME, by Charles Dickens, London, Bradbury and Evans, 90, Fleet Street and Whitefriars (1846). *Illustration: "CHIRP THE SECOND," by R. Doyle, Engraver E. Dalziel.*

**JESSE:** [At desk.] Do you know Dicken's *Cricket on the Hearth*? It tells a fairy tale of home, of Caleb Plummer, a loving father, and his blind daughter who lived all alone. Chief Justice White referred to the book, you will hear, when he told of his change of heart towards "Old Glory" at the new Willard Hotel, in the Nation's Capital, at the start of the October Term 1914.

Act V of our play portrays the Cricket Spirit in Chief Justice White. He too had a Cricket on his Hearth and spoke the Voice in which the Spirits of the Fireside and the Hearth address themselves to all human kind.

PRESIDENTS THEODORE ROOSEVELT AND WILLIAM HOWARD TAFT, at White House *changing of the guard*, 1908.



**JESSE:** By Jove! Ladies and Gentlemen, new here are two very large crickets indeed!—Presidents Theodore Roosevelt and William Howard Taft, at White House changing of the guard, 1908.

After Chief Justice White announced the *Standard Oil* decision, Theodore Roosevelt exclaimed the Supreme Court has an edge over the other branches of government: "The President and the Congress are all very well in their way. They can say what they think they think, but it rests with the Supreme Court to decide . . . what they have really thought!"



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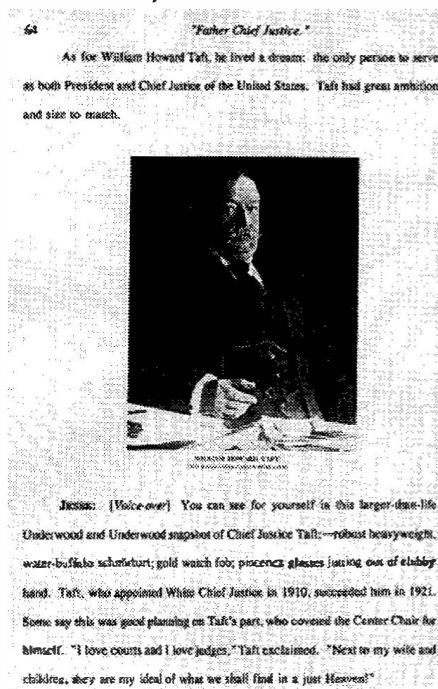
As for William Howard Taft, he lived a dream: the only person to serve as both President and Chief Justice of the United States. Taft had great ambition and size to match.

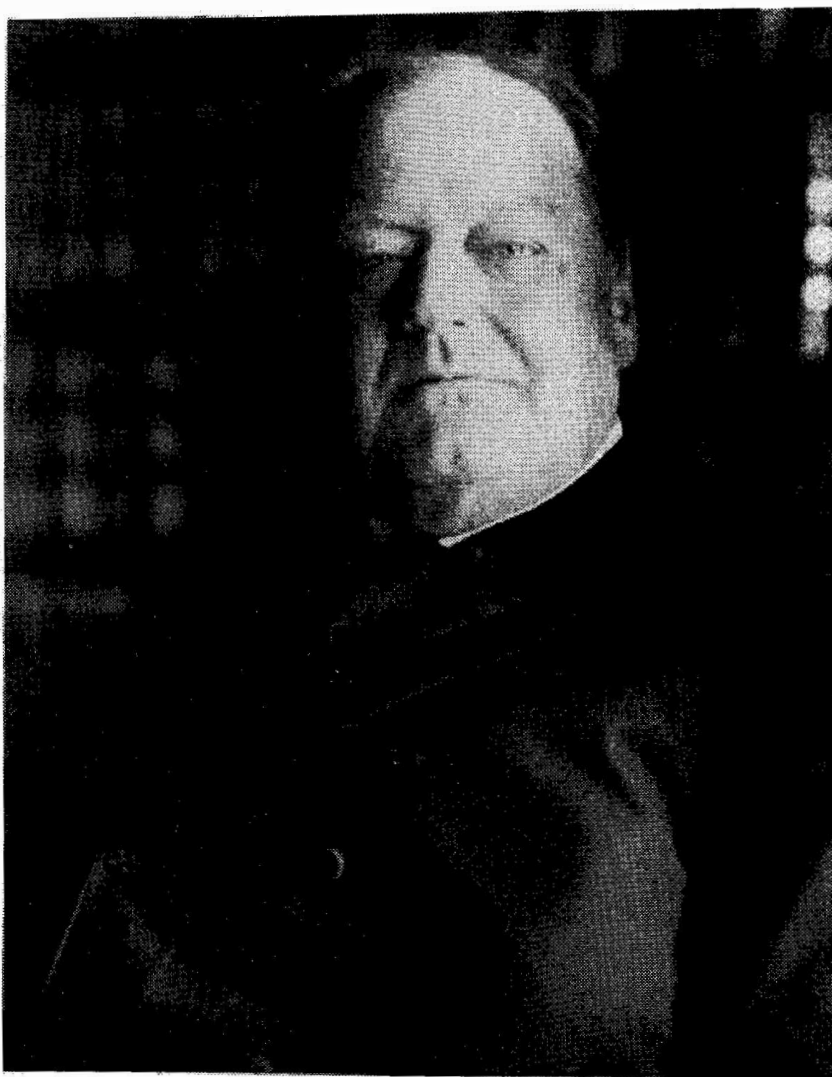
WILLIAM HOWARD TAFT, *Chief Justice of the United States: robust heavyweight; water-buffalo schnurrbart; gold watch fob; pince-nez glasses jutting out of clubby hand.*

**JESSE:** Taft, who appointed E. D. White Chief Justice in 1910, succeeded him in 1921. Some say this was good planning on Taft’s part, who coveted the Center Chair for himself. “I love courts and I love judges,” Taft exclaimed. “Next to my wife and children, they are my ideal of what we shall find in a just Heaven!”

Well, this may go too far for some members of the audience!

Taft was asked which position he preferred, being President or being Chief Justice? “Chief Justice” was his immediate answer:—“All power, no responsibility!” he chortled.





Library of Congress

E. D. WHITE nears the end, May 1921.

## SCENE I.—DANCE WITH THE MUSIC.

*May 1921. CHIEF JUSTICE WHITE nears the end. The CHIEF JUSTICE and LEITA WHITE are at home: 1717 Rhode Island Ave. He at his desk, she in a rocking chair reading the Washington newspapers. WHITE's desk is a large Louisiana Planter's desk made of bald cypress. It belonged to his Father. Stacks of court papers—records and briefs—lie on the floor at the Chief Justice's feet like little soldiers standing at attention. A red rose, WHITE's daily offering to LEITA, smiles at the audience on a small table, up center.*

CHIEF JUSTICE WHITE, *rising from his desk, comes up center and recites a letter home to New Orleans, to his lawyer friend, Henry Dart—as death plucks WHITE's ear.*

CHIEF JUSTICE WHITE: [*Letter in hand.*] Twenty-seven years ago when I came to the Court it was suggested that I would lose touch with the lawyers of Louisiana. On the contrary, every association and tie of friendship is rooted in Louisiana, to which I consider I belong, and from which I hope never to be separated.

I recall my hesitancy in my signing the final paper to put the plantation out of my life. I was born there, my father and grandfather lived there, and almost everything that is dear to me in memory was associated with it.

There are whisperings that the end is near. *The New York Times* says I will resign in favor of Taft, who queried me,—a veritable doctor of physic!—as to my health. I told him I can still read and write! I said nothing of quitting. Instead, I warned him of the dangers that arise from wrong decisions!

Holmes, like a traitorous Union mule, insists Congress has no power to regulate primary elections for U.S. Senator—I refer to the *Newberry* federal election case. I reminded him of his opinion saying Congress could protect migratory birds. If migratory birds, why not Senators? I naturally asked. “A Canadian Goose does not a Senator make,” he howled. [*Frustrated.*] I put my arm around him and pressure him good, but . . . [*looking at LEITA with a twinkle*] . . . but my “PHYSICAL APPLICATION OF THE LAW!” does no good.

Congress's power to regulate the election of its members does not include *primary* elections, says Holmes, which are reserved to the States. But this idea is a suicidal one, since the influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement. My Brother Holmes, truth to tell, has no political horse sense whatever! I am in dissent, with Brandeis.

THE CHIEF JUSTICE *returns to his desk and his chair.*

CHIEF JUSTICE WHITE: [*Still reciting perfectly from memory to Henry Dart.*] Now, as to the statue you propose, should one ever be erected in my memory, I would prefer my bronze bones to rest on Royal Street, in the Vieux Carré, rather than in the National Statuary Hall in the Capitol.

WHITE *leans back from his desk and is blessed again by the sight of his hearth and home—and LEITA by his side. The C.J. focuses on MRS. WHITE.*

CHIEF JUSTICE WHITE: Anything in the papers, ma Chère, about the Court's releasing a dreadful smuggler from prison?

LEITA: No, Precious.  
Why do you ask?

WHITE: A reporter asked me about it. "Why on earth would the Court let a dreadful smuggler go free?" he queried. I was with Holmes and McKenna, swinging along on Pennsylvania Ave.—our daily walk home from Court. "Well, Mr. Reporter," I answered, "It must have been because I kept remembering the bottoms of my wife's trunks every time we came home from Europe!"



Library of Congress

Holmes congratulated me, but now I worry about my remark showing up . . . in dead seriousness in the newspapers! Why—God forbid! . . . it would ruin the Court.

LEITA: Oh, I don't know, Ned. A laugh on Pennsylvania Avenue won't tarnish the Court. I worry more about the Court taking itself too seriously . . . and THE CHIEF JUSTICE working too hard! Why don't you and Captain Holmes raid the American League grandstand tomorrow and watch baseball . . . instead of reading those [*pointing to stacks piled high on the floor*] lawyers' briefs.

CHIEF JUSTICE WHITE *gets up from his desk, salutes the platoon of records and briefs at his feet—his company for twenty-seven years now—and marches over to MRS. WHITE.*

WHITE: [*At LEITA's side, caressing her shoulder.*] Leita, my love, Brother Holmes has no idea of a double play or a balk. He is a Boston Bookworm . . . on Mt. Olympus . . . while this old Lafourche Live Oak prefers a box-seat any day. But I'm afraid, Leita darling, my innings are numbered.

LEITA: You have been putting off your surgery for too long, Ned, . . . [*Anxiously.*] I pray all goes well.

WHITE: [*At peace.*] I am happy to put myself in God's hands, Leita, believing we are all his children. I remember telling the Conference once: "Here is a hard case. God help us!" Holmes winced! I am one of those men who thinks that somewhere, sometime, I must give an account of the deeds done in the body. We will see the Lord, my darling.

[*Jovially.*] My Brother Holmes [*exclaiming, in half seriousness*] . . . he doesn't believe in anything! If I say to him, "This is right," or "This is wrong," he will say, "Now you are using terms that I don't know anything about." But I love Wendell as a brother.

THE CHIEF JUSTICE *walks slowly up center, captures the red rose from its table vase like a knight rescuing a princess, and addresses LEITA, keeper of his heart and hearth for twenty-seven courtly years.*

WHITE: Leita, my darling, you are the greatest blessing of my life, a rose for all eternity. [*Clutching the rose to his heart.*] To Captain Holmes of the Twentieth Massachusetts I confessed my surgery—tomorrow 11:30 A.M.—in a letter carried by messenger to 1720 I Street this morning. It may be my last farewell, as God wishes, should I . . . [*falters momentarily, then a flash of Tennyson*] . . . should I see my Pilot face to face, when I have crossed the bar.

WHITE *now stands at attention, soldier-like, his head held back, forehead facing Heaven. Cataracts squeeze his eyes shut. His mind drifts back to the BLUE at Fredericksburg and the GRAY at Port Hudson.*

WHITE: [*Ending his letter to HOLMES, by heart.*] I got to worrying about some of the work here and so came back to my library for a few days in order to get things straight and then go back and face the music, which I propose to do tomorrow.

It is not dance music by any means, but all the same I am going to try to step out with hope and confidence in the outcome, which I know I will do if I can only fix my mind on the young fellow lying face down in the lines of Fredericksburg and fearful of only one thing—that he might be hit in the back!



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## SCENE II.—TAPS.



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*May 21, 1921. A funeral procession marches to WHITE's home. MR. JUSTICE HOLMES, in a finishing cantor, brings up the front line. A Union and a Confederate Bugler play taps, up center—the Blue and the Gray as One. CHIEF JUSTICE WHITE's casket is carried out of 1717 Rhode Island Ave. HOLMES stands at attention, on the right flank. Burial in Oak Hill Cemetery, high atop Georgetown.*

**ARCHBISHOP PHILIP HANNAN:** [*Comes on.*] The little town of Thibodaux is a very Catholic one. Chief Justice White was baptized in St. Joseph's Church aside the waters of Bayou Lafourche. The Church's bell "Maria" still tolls the faithful to Mass on Sunday.

I am Philip Hannan, Archbishop of New Orleans, retired. When I was growing up my family lived in the neighborhood of Chief Justice White in Washington. He was Chief Justice of the United States. I was his altar boy at his funeral.

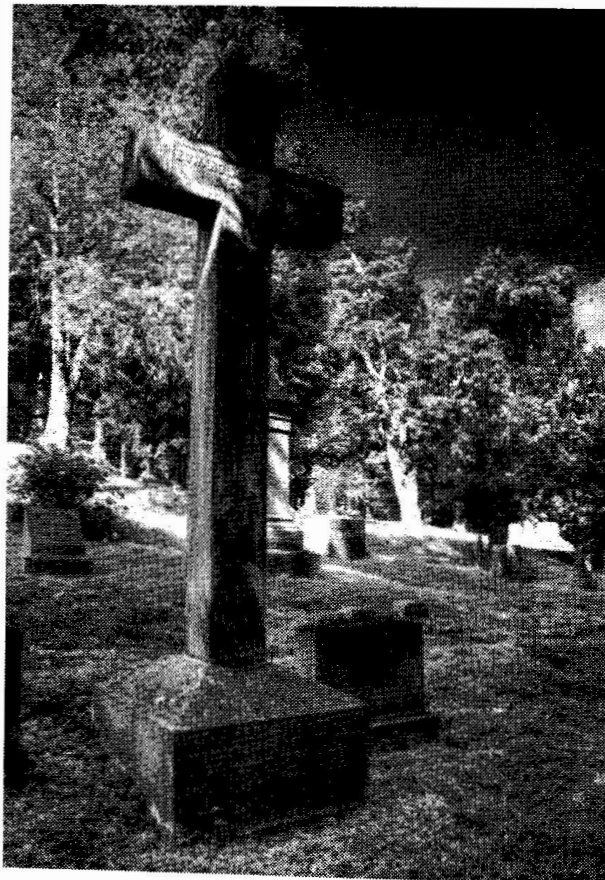
E. D. White's deep Catholic faith inspired his nomination to the Supreme Court.

At a party given by one of White's fellow United States Senators, President Grover Cleveland overheard White ask if there was a church nearby where he could attend early Mass. "I made up my mind," said Cleveland, "that there was a man who was going to do what he thought was right; and when the vacancy came, I put him on the Supreme Court."

Chief Justice White put his trust in God, even on the Court. At Conference, where the Justices meet to decide the cases, he once exclaimed: "Here is a hard case. God help us!"

Romance came late in life to Edward Douglass White, but when it hit him, it hit him hard. Each day, on his daily walk home from Court, he brought his wife, Leita, a single, long-stemmed red rose.

The Chief Justice and Mrs. White attended Mass at St. Matthew's Cathedral in Washington, a short walk from their home at 1717 Rhode Island Avenue. They are buried next to each other in Oak Hill Cemetery, a stone's throw from the living waters of Rock Creek. A large white cross marks the spot.



Vicenç Feliú



Edward Douglass White's life—"by God's grace," he would say—was a family tale of home. We thank God for Chief Justice White's Great Spirit of the Fireside and of the Hearth. We pray, our Heavenly Father, that his love for humanity will endure to the end of time and fill our hearts with happy music, a happy feeling!

In the name of the Father, the Son, and the Holy Spirit, Amen.

### SCENE III.—MEMORIAL PROCEEDINGS.

**JESSE:** [*Voiceover.*] Memorial Proceedings, City of Washington, Saturday, December 17, 1921. The Bar of the Supreme Court of the United States and the Officers of the Court meet in the courtroom in the Capitol at 12 o'clock noon. Mr. Henry P. Dart, Esq. speaks on behalf of Louisiana and her citizens.

**HENRY PLAUCHÉ DART:** Mr. Chairman:—I am of the same countryside as the late Chief Justice, and if I shall fall into a more intimate or personal view of that great citizen of Louisiana, this must be my excuse. The place of Chief Justice White's birth was that region hallowed in literature as the home of Evangeline, a country watered by bayous, drifting gulfward between the Teche and the Mississippi, the land of Acadia. It was then a center of taste and cultivation, an old civilization dating from the first migration of the French to Louisiana. Within its wide boundaries lay proud St. Martinville, the "Little Paris" of the old French colony, and the village of Thibodaux, with a cluster of sugar plantations supporting it that spread its broad acres westward from the banks of Bayou Lafourche.

Chief Justice White was lucky in the quality of his birth—a country boy! That impalpable difference between the city and the country born, the children of the paving-stones and those of the field and farm, must always be considered in summing up the assets of a man's career.

I must add something that is strictly Louisianian. We lawyers of that State are the little brothers to the rich in the legal system of the United States. We follow a course in many respects alien to yours.

The terminology of our law is foreign to your law; but we have many things in common, and the career of Judge White in this court is an illustration of what is going on in Louisiana.

Edward Douglass White came to this bench with a knowledge of two distinct systems of law. Every question before him was subjected to an analysis in which both methods of thought had their part, and we cannot avoid feeling that the jurisprudence has been enriched in the result.

With the civil, so with the public law enunciated by the Chief Justice. Coming from a State that once was the seat of a narrow construction of the Constitution, he demonstrated his faith, the faith of the people of Louisiana I may add, that the rights of the State under the Constitution have not been narrowed or limited but accommodated and protected by a wider outlook upon the Union than his forefathers took.

I have said that the legal system of Louisiana is the little brother of your great system, but it should not be surprising to you to know that while White was on this bench we regarded ourselves as in the house of our father. We were no longer strangers here. His door was always open to us. We participated in the domestic happiness of his fireside and of his hearth.

And when we returned home we felt as a storm-tossed mariner feels when he finds the light still burning and the course still clear. Alas, the watcher of the light has left it, but it shall continue to burn in our hearts forever.

**JESSE:** A month later, Monday, January 16, 1922, the Supreme Court meets to pay its last respects to Chief Justice White.



WILLIAM HOWARD TAFT

*By Harris & Ewing*

**CHIEF JUSTICE TAFT:** [*Center chair.*] Edward Douglass White had a great heart, full of sympathy for mankind. He had an unfailing courtesy and a sweetness of manner which endeared him to all with whom he was associated. He carried candy in his pocket for little children and cigars for his colleagues. He was everybody's Chief Justice!

The strength and ruggedness and dignity of his character were stamped in his face, and these things but lent a peculiar charm to his gentleness and kindly manner. He was a gentleman of the old school.

Chief Justice White's power as a speaker was revealed in later years by the few addresses he was induced to make to the American Bar Association. At Washington his hearers were captivated by the grace and fluency of his diction, the exquisite charm, dignity, and force of his bearing, and the depth of his expressed conviction. His touching metaphor to illustrate his own change of heart toward "Old Glory," of the fading of the gray of the Confederacy into the blue of the Union, "the invisible blue" as he adapted it from the moving story of the "*Cricket on the Hearth*," will never fade from the memory of those who were privileged to hear him.

CURTAIN.

## SCENE IV.—THE KIND VOICE OF FRIENDS.

*Spring 1931. Beverly Farms, Massachusetts.*

JUSTICE HOLMES, *silver hair and moustache, neatly combed, wingtip and loosely tied cravat, is seated on a bench, up center, at footlights, hat in hand, facing audience. At 90 he is as handsome as ever. His mind drifts back to Antietam, to his survival of a shot through the back of the neck, to his service on the Supreme Court with his Confederate confrère NED WHITE—miracle that it was.*



Harvard Art Collection

HOLMES's voice is heard, over scene,—a muse as the final curtain nears.

HOLMES: [*His voice, mellow, at 90.*] In this symposium, my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task. But I may mention one thought that comes to me as a listener-in.

The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voice of friends and to say to one's self: "The work is done." But just as one says that, the answer comes, "The race is over, but the work never is done while the power to work remains."

The canter that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.

And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago:

"Death plucks my ear and says, 'Live, I am coming.'"

HOLMES, *still sitting in silence, rises stiffly from his bench. He steps forward toward the audience, still lost in reverie, as though to greet his old Chief E. D. WHITE one last time. He is dangerously near the edge of the stage. A cry off stage, rear, "Mr. Justice! Mr. Justice!" breaks Holmes's reverie. It is JESSE.*

*Enter PROFESSOR JESSE, up center, hurriedly.*

JESSE: [*Excitedly.*] MR. JUSTICE! MR. JUSTICE HOLMES!—I'm Professor Richard Henry Jesse, an old friend of Chief Justice White. We're honored to have you here in Thibodaux, Louisiana, White's birthplace.

HOLMES: [*Astounded.*] Thibodaux? I thought the scene was Beverly Farms, Massachusetts?

You mean we're actually in Ned White's land of sugar cane and Spanish moss?

JESSE: Yes,—Mr. Justice.

HOLMES: Well, I'll be damned! I should like to see White's sugar cane fields in full regalia, if you please. You should have heard White roar about the economic ruin left by the Civil War.

I liked White, you know. He was a great friend of mine, a big, high-minded man. His writing was too long-winded, just as he used to criticize my opinions as being too cryptic. But his thinking was profound.

Reason was his major premise, "By the light of reason," he was fond of saying. Christ knows, did it pour forth!

I prefer my sledgehammer "CAN'T HELPS." You know:—"The Constitution does not enact Mr. Herbert Spencer's *Social Statics*." [*Proudly.*] Now there's a sledgehammer, Jesse!

[*Realizing JESSE's youth.*] While we're at it . . . Son, I want to sit at the hearth of White's boyhood home . . . only Confederate Soldier Boy I know of who was [*proudly*] MY CHIEF JUSTICE OF THE UNITED STATES!

JESSE: Thibodaux's citizens, I'm sure, Mr. Justice, will open their hearts and homes to you. They are honored to have you here.

**HOLMES:** [*With great bravado.*] Considering the circumstances, Jesse, I should rather say, the fascination is completely mine!

**JESSE:** But first we have to finish our play.

**HOLMES:** Play? What play? I thought I was sitting in silence at Beverly Farms?

**JESSE:** This is the last scene of a play about E. D. White and the Constitution.

**HOLMES:** And I suppose next . . . you'll tell me I'm in it, what?

**JESSE:** Oh indeed you are, Mr. Justice.

**HOLMES:** [*Gladly, reflectively.*] Good thing—a play, . . . like a molded bronze, or a painted portrait . . . helps to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget.

*HOLMES pulls a Baccarat Rothschild cigar from his lapel pocket and flaunts it airily. It is evident he is enjoying his new role.*

**HOLMES:** [*Puffing up.*] Made a play about me, you know.

Called it "The Magnificent Yankee." Reminded me of what I said when I saw Hopkinson's portrait of [*puffing again*] YOURS TRULY, unveiled at the Court. [*Roaring like a lion.*]"IT'S NOT ME, BUT IT'S A DAMN GOOD THING THE AMERICAN PEOPLE . . . THINK IT'S ME!"

How do you like that, Jesse! . . .

[*Quizzically.*] What do you call your play?



OLIVER WENDELL HOLMES, JR.  
Attorney General, 1901-1903

Collection Supreme Court of the United States

JESSE: "Father Chief Justice."

HOLMES: Oh, that fits White fine. Louie—I mean [*with great dignity*] MR. JUSTICE BRANDEIS—used to address him that way, formally, at Conference.

"Father Chief Justice," is it? What would you have me say in this play of yours?

JESSE: Just tell White's people what you remember most about him.

HOLMES: Remember most? That's easy. I should say simply [*proudly concise*]: —That he lived. . . . He lived fully. He breathed the actions and passions of his time. He gave us a sample of his best. More than that, you cannot ask of any man.

JESSE: Is there one scene that sticks in your mind?

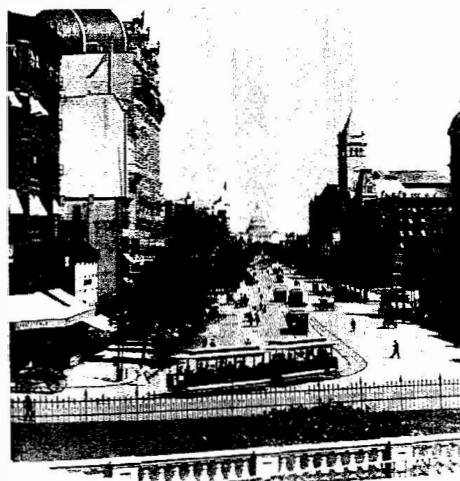
HOLMES: Oh, well, . . . now you're sneaking me into script-writing, are you?—My dear Jesse [*flicking his cigar, glowingly*].

Oh yes, there's a scene all right,—what White said about his change of heart towards "Old Glory." Fanny and I were in black-tie at the Willard Hotel that night. Always enjoyed getting suited up, trotting out to dine, . . . with Fanny on my arm, you know.

Now there was a speech by which to remember Thibodaux's Soldier Boy, . . . [*with childish glee*] our FATHER CHIEF JUSTICE . . . —E. D. WHITE!

*Lights fade as O.W.H., JR., and JESSE exit.*

*The New Willard Hotel, Thursday evening, October 22, 1914, Annual Banquet of the American Bar Ass'n. The traditional toast, "The Supreme Court of the United States," is presented to CHIEF JUSTICE and MRS. WHITE, sitting at the head table with JUSTICE HOLMES and FANNY at their side—all in formal dinner attire.*



*National Park Service*  
PENNSYLVANIA AVENUE FROM THE TREASURY, c. 1908

E. D. WHITE *rises, comes up center, and addresses his entire audience.*



THE NATIONAL CYCLOPEDEAN OF AMERICAN BIOGRAPHY

*E. D. White*

**CHIEF JUSTICE WHITE:** To respond to toast has always seemed to me submitting oneself to a roast because of the discomfort by anticipation, the misery in performance, and the dissatisfaction on account of things unsaid since only afterwards thought of.



I have refrained since becoming Chief Justice from accepting invitations to make after-dinner speeches because of a tradition that that official was never to be expected to reply to an after-dinner toast. The warmth of the request of the committee in this instance compelled me to consider the reason of the tradition, and I have become convinced that it is not far to seek, since, putting aside the impossible suggestion that there was danger in the Chief Justice agreeing to make a speech after dinner, it is apparent that the rule rests alone upon the assumption that if he said something, he might do that which he was not expected to do, . . . and if he said nothing, he might fail to do that which ought to have been done.

But be that as it may, after overcoming the personal disinclination because of a feeling that to accept the invitation would afford an opportunity to avail of that so infrequently relied upon constitutional provision, [*pause, then with emphasis*] THE EQUAL PROTECTION OF THE LAWS, by turning the tables on my brethren of the profession and compelling them to be listeners, no difficulty was experienced in departing in this instance from the tradition, since in no possible way could it have application to the Chief Justice [*with emotion, slowly*] speaking in his own household and to members of his own family. |

*Long pause, as though thinking back to his capture at Port Hudson.*

I take it, it may not be at this day doubted that the underlying controversies which brought about the Civil War existed prior to the Constitution as the result of divergent institutions and conflicting opinions which were not harmonized when that instrument was adopted and therefore were left open for subsequent adjustment, and which, by the operation of the laws of self-interest or of conflicting conceptions of duty or even as the consequence of human passion, it became impossible to settle, and which therefore were fanned into the flames which caused that great conflagration.

But neither side to that mighty controversy struggled to destroy constitutional government as they understood, but both on the contrary sought to perpetuate and preserve it as it was given them to believe that it should rightfully exist.

Underlying the whole struggle, when dispassionately looked at, was the purpose to protect and defend free and constitutional government as it was deemed our fathers gave it. And this affords a ready explanation of how when the smoke of battle had passed away and the storm had subsided, the supremacy of our constitutional system by natural operation had resumed its sway, and peace and brotherhood reigned where warfare and enmity had hitherto prevailed.

Let me illustrate. Do you recall the toymaker and his blind daughter, created by the genius of Dickens and so admirably interpreted by that great artist Joseph Jefferson, in "*Cricket on the Hearth*," where with a tenderness which may not be described, mistaken though it may have been, in order to conceal the poverty and misery of his surroundings the father pictured to the blind one whom he so much loved his environment as one of prosperity and affluence?

Let us listen to her as she places her hand upon his threadbare gray coat, which she deemed from his description to be one of some rich fabric, and hear her question, "What color is it, father?"

"What color, my child? Oh, blue [WHITE's voice is trembling; he is back at Port Hudson's dead line]—yes—yes, invisible blue."

*Another pause; WHITE regains himself, starts up again.*

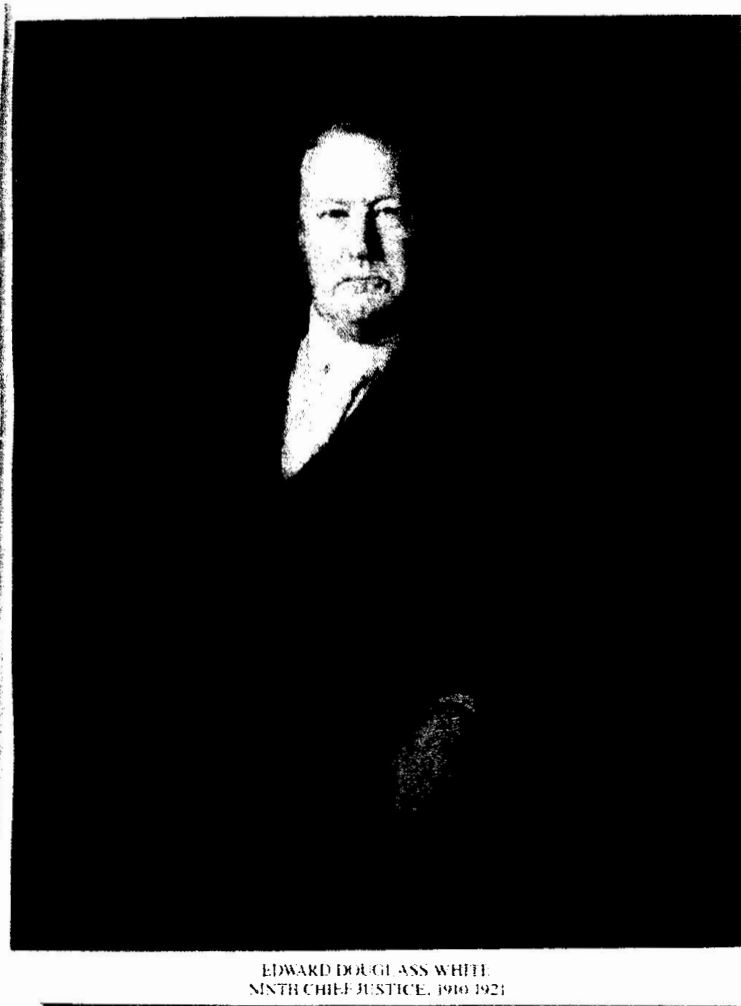
And now with the mists of the conflict of the Civil War cleared from my vision, as my eyes fall with tender reverence upon that thin gray line, lo, [with great emotion] the invisible has become the visible, and the blue and the gray [pause, nearly unmanned], thank God, are one.

WHITE turns away from the audience, tears uncontrolled, and walks slowly back to the waiting arms of LEITA, his BROTHER HOLMES, and FANNY. They are on their feet, with the entire audience, in loving applause. As the curtain falls, CAPTAIN HOLMES stands at attention and salutes his FATHER CHIEF JUSTICE E. D. WHITE.

*As the audience leaves the Theater, the Rosenthal Portrait of E. D. WHITE, in golden tones, is projected onto the stage. "Feel So Good," the final cut from the Magnificent Seventh's Brass Band, Authentic New Orleans Jazz Funeral, Milton Batiste, Producer, Mardi Gras Records, captures the spirit. In the foyer, the Rosenthal Portrait of WHITE, on loan from the Louisiana Supreme Court, is up on an easel surrounded by a bucket of long-stemmed red roses. Two Thibodaux teenagers invite passers-by to take a rose and give it to a loved one. The roses disappear in short order.*

PROF. JESSE is pleased.

### CURTAIN



Collection Supreme Court of the United States

## A NOTE ON SOURCES\*

Professor Richard Henry Jesse's tribute to his friend Chief Justice White in the May-June, 1911 No. of *The American Law Review*, with its facing portal portrait signed "Yours, E. D. White," is convincing proof that Jesse's admiration and affection for Chief Justice White are real and that the Professor belongs in the play. Holmes's reflection, "Good thing—a play, like a molded bronze, or a painted portrait . . . helps to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget," is drawn from Holmes's Remarks at the Unveiling of Memorial Tablets at Ipswich (1902), in Mark Howe's *The Occasional Speeches of Justice Oliver Wendell Holmes* (1962), and is The Muse, so to speak, of "*Father Chief Justice*."



Library of Congress

The scenes, dialogue, and drama of "*Father Chief Justice*" are drawn from the author's thirty years of studying and teaching the Supreme Court, with perennial appearances, his students would tell you, of the Constitution's Blue and Gray oracles—Holmes, Brandeis, and White, JJ. Our reading list includes the endless chain of Holmes biographies, from Francis Biddle's playmaking *Mr. Justice Holmes* (1942), spark and tinder of Emmet Lavery's "*The Magnificent Yankee*," to Catherine Drinker Bowen's biographical drama *Yankee From Olympus*

(1944) ("We want to see him fighting and we want to see him living, day by day. We want to hear him talking."); through, most recently, Sheldon Novick's *Honorable Justice* (1989) and Liva Baker's *The Justice From Beacon Hill* (1991)—all of which are a picture frame for "*Father Chief Justice*."

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\* "I don't think you ought to change your name to Professor Jesse—how about Shakespeare? I especially appreciated your note on sources."—Gerald Gunther, William Nelson Cromwell Professor of Law Emeritus, Stanford Law School, to Paul R. Baier (July 29, 1998) (letter on file with author).

Sister Marie Carolyn Klinkhamer's biography, *Edward Douglas White, Chief Justice of the United States* (1943), details E. D. White's deep learning and Southern humanity, his faith in God, his daily rose for Leita, his favorite locutions—both on and off the Court. Sister Marie is essential reading for anyone who would know, or portray, Chief Justice White. Holmes's *Speeches* (5th ed. 1913) plays a part. "The Soldier's Faith" (1895) is heard anew after a hundred years—with its "song of the sword in its scabbard, a song of oblivion and peace."

Holmes's address on "John Marshall" (1901) tells listeners—in, "It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose."

*The Holmes-Pollock Letters* (Mark deW. Howe ed. 1941) and Justice Holmes's revealing correspondence with his Chinese friend Dr. John C. H. Wu, Recent Letters to Dr. Wu, in *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (Harry C. Shriver ed. 1936), are the fount of Holmes's talk about White in ACT III, "At Home," with Justice Louis Brandeis and Fanny Holmes. Justice Brandeis's confidential conversations with Felix Frankfurter, unearthed by Melvin Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Supreme Court Review 299, 333, include L.D.B.'s telling perception that White "had the grand manner and was of the 18th Century." This is a good example of the truth spoken by the courtly figures of "*Father Chief Justice*."

*The New York Times's* account of The New Chief Justice of the United States—"Big, Genial, and a True Type of Southern Gentleman"—Sunday, December 18, 1910, quotes White's immortal utterance: "The quintessence of a judge's fame lies in labor." White's nephew-in-law Preston Gibson tells us of the Chief Justice's self-deprecating worry: "I can remember nights in his library at 1717 Rhode Island Avenue, when he walked up and down the room and would stop and say, 'I am afraid the position is too big for me.'" The Human Side of the Late Chief Justice White, *The New York Times*, May 22, 1921.

*The New Orleans Times-Picayune* sets the stage for the Prologue's ceremony of unveiling: "Somewhere in the crowd a band played old Southern airs, soft and sweet in the April sunshine." Speakers Laud Character of Justice White as Statue in His Memory is Unveiled, *The Times-Picayune*, April 9, 1926, section 1, p. 3.

Sculptor Bryant Baker and the Widow Leita White's remarks are preserved in a little pamphlet, bound in Confederate Gray, *On the Unveiling of a Statue of Edward Douglass White, Ninth Chief Justice of the United States, At New Orleans, April 8, 1926*. This fleck of gold is carefully tucked away in Hill Memorial Library, Louisiana State University.

The author himself sat in silent admiration in the audience of the Louisiana Supreme Court as Archbishop Philip Hannan of New Orleans told the Sunday School story of President Grover Cleveland's appointment of White to the Court: "I made up my mind that there was a man who was going to do what he thought was right; and when a vacancy came, I put him on the Supreme Court." Archbishop Hannan's part in our play derived from his earlier Bicentennial remarks, *Commemorative Proceedings for the Bicentennial of the Supreme Court of the United States*, 573-574 So.2d xl-xli (Feb. 2, 1990).

Secretary of State W. Fox McKeithen's ghost story of hearth and home on Bayou Lafourche, ACT I, sc. ii, is lifted whole (with permission) from Historic Building Consultant Sid Gray's *Edward Douglass White House: A Historic Structure Report* (May 1996). The curious-minded can acquire a colorful video of Gray himself crawling in the rafters of "The Old St. Gabriel Church" by writing Sid Gray at 601 St. Joseph Street, Baton Rouge, Louisiana 70802.

The front page of Thibodaux's *Daily Comet* for Monday, March 14, 1994, proudly catches Justice Antonin Scalia's centennial throw from the porch of the Edward Douglass White Home: "Our history is what makes us who we are. If we forget our history we've lost a part of ourselves." These words will not lightly fade from the memory of those faithful of White's people who gathered about his boyhood porch to hear Justice Scalia. Another Muse for "*Father Chief Justice*."

Of course, Holmes, Brandeis, and White, JJ., are voices of the Constitution—I mean officially speaking. Thus the *United States Reports* is wired for sound, so to speak, in "*Father Chief Justice*": e.g., MR. JUSTICE HOLMES, dissenting: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905); and again, MR. JUSTICE BRANDEIS, dissenting: "*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law." *Adams v. Tanner*, 244 U.S. 590, 600 (1917).

"Sometimes, if we would guide by the light of reason, we must let our minds be bold." *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (MR. JUSTICE BRANDEIS, joined by MR. JUSTICE HOLMES, dissenting).

And from E. D. White we hear plain political truth: "[T]he influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men [except Holmes!] that the proposition may be left to destroy itself by its own statement." *Newberry v. United States*, 256 U.S. 232, 263 (May 2, 1921) (MR. CHIEF JUSTICE WHITE, dissenting).

*Newberry* was White's last judicial breath. Lest it be thought that Professor Jesse's enthusiasm for Chief Justice White is inflated, let us listen to contemporary scholars sizing up White: "There are moments in the history of the Supreme Court when the transcendent force of the Constitution seems to dispel the confines of parish and class, and when a Justice evokes a panorama of constitutional development across eras in the nation's history. As the shadows lengthened for Edward Douglass White in the summer of 1921, the *Newberry* case fired his usually circumlocutory and doubting mind with a passionate eloquence and conviction. Can anyone not be moved by the poignancy of the ex-Confederate's nationalist thunder against 'the phantoms of attenuated and unfounded doubts concerning the meaning of the Constitution, which have long perished.'" Alexander M. Bickel, Benoit C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910-21*, at 978, IX *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (1984).

The red rose motif of "*Father Chief Justice*" is more the author's idea, I suppose, than reality. It is the fact, though, that each afternoon on his daily walk home from Court White invariably brought Leita a single long-stemmed red rose. Kenneth B. Umbreit, 2 *Our Eleven Chief Justices: A History of the Supreme Court in Terms of Their Personalities* 377 (1938).

The symbol of "The Constitution—all wrapped up in a rose" and Holmes's ejaculation, "By Jove . . . that's poetry,—from a Jesuit! I told you, Louie, our Chief has insights . . . . Now he shows himself a Goethe come round on Constitution Day!", these brush strokes are the author's, I confess. But permit me to paraphrase another of our protagonists, Mr. Justice Holmes, to silence the stone of heart: "Good thing—a rose . . . and romance's license!"

And as judges speak truth, I beg you hear Judge James L. Dennis, himself a member of The Cricket Tribe, recount the story of Holmes and White adopting "a tradition, on September 17th each year, of exchanging a single scarlet red rose. There is no authentic account of the reason for this ritual. Chief Justice White was a great man for ritual. . . . So White may have started the tradition involving Holmes and the rose also, but the reason for it is not spelled out anywhere. It is believed that because the two Justices had fought on opposite sides in the Civil War and because September 17th was the date of the battle of Antietam in which Justice Holmes had been wounded, that the scarlet rose symbolized the renewal of brotherhood after the shedding of brotherly blood. But September 17th is also Constitution Day, the day of the signing of our great charter of government. Thus, it may be that White and Holmes also wished to signify the renewed strength of the Constitution and the unity of the Nation following the strife of civil war." *Commemorative Proceedings for the Bicentennial of the Supreme Court of the United States*, 573-574 So.2d xlv (Feb. 2, 1990). This is good enough for me.

The Memorial Proceedings of ACT V, Cricket on the Hearth, cast light through Henry P. Dart's Homeric lens ("the children of the paving-stones and those of the field and farm") and Chief Justice Taft's large focus: "White had a great heart, full of sympathy for mankind." *Memorial Address*, 149 La. vii, x (1921); *Proceedings on the Death of Chief Justice White*, 257 U.S. xi, xxviii (1921). The Justice Sam A. LeBlanc Papers in the Louisiana Collection, Hill Memorial Library, LSU, bear witness to Chief Justice and Mrs. White's returning home to Bayou Lafourche, to White's birthplace, and to the White sugar plantation "come to life after the Civil War." The Memorial Gate of the Knights of Columbus stands proudly in these Memorial manuscripts. But, alas, Chief Justice White himself left us none of his papers; they have vanished like the ghost of the ironwork eagle atop his Thibodaux Memorial Gate. Thus biographers and playwrights alike must come at E. D. White sideways, through the manuscript collections of his side judges.

In one golden particular, "*Father Chief Justice*" owes E. D. White's final appearance, his confession to Captain Holmes of pending surgery: "tomorrow 11:30 A.M."—ACT V, sc. i, "Dance with the Music,"—to Sheldon Novick's brilliant panning of The Holmes Papers at Harvard Law School.



Mr. Novick is our Sutter at the Mill. See E. D. White to O. W. H., May 9, 1921, a gold nugget, quoted in *Honorable Justice* 341 (1989).

Holmes's wit, his "light touch and humor of a man of the world," is put at your fingertips in Ed Bander's *Justice Holmes Ex Cathedra* (1966) and Harry Shriver's *What Gusto* (1970). Both are on the author's reference shelf. As to Teddy Roosevelt and Taft's appearance in the play ("By Jove, now here are two very large crickets indeed!"), their lines are lifted from Henry Pringle's *Theodore Roosevelt* (1931) and Alpheus Mason's *William Howard Taft* (London, 1964).

The big heart, the soul, of "*Father Chief Justice*," it stands to reason, is Edward Douglass White himself. His eulogy of Senator Randall Lee Gibson, XXIV Congressional Record—Senate, March 4, 1893, at 231; his *Princeton Alumni* recital of his capture at Port Hudson, xx, at 525 (May 15, 1912); his "Cricket on the Hearth" tale of his change of heart towards Old Glory, 7A.B.A.J. 341 (1914)—these are the wax and wick of Professor Jesse's small lighted candle: "We meet anew to rekindle the flame."

As to Father Chief Justice White's trust in God, even at Conference—"Here is a hard case. God help us!"—Merlo Pusey's interview with Chief Justice Hughes sits us at the table. 1 *Charles Evans Hughes* 282-83 (1951). Solicitor General John W. Davis reports Chief Justice White's conviction that "somewhere, sometime we must give an account of the deeds done in the body. My brother Holmes doesn't believe in anything: If you say to him, this is right and that is wrong, he will say, 'Now you are using terms that I don't know anything about.'" William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* 108 (1973).

Mr. Davis himself tells us that "It is true to say" was one of White's favorite phrases; thus we hear it from our "Father Chief" in the play. And, adds Davis about our protagonist E. D. White: "[M]uch of the man himself escapes the printed page: the dignity of his judicial bearing, his unfailing courtesy to the bar, his patience during argument, the swift thrust of his questions, his extraordinary memory which rendered him wholly independent of written notes, and in oral deliverance the fluency and beauty of his diction and the deep and melodious tones in which he spoke—all these are for memory alone.

"Nor do any books record the simple beauty of his private life, his gentle kindness to all around him and the personal modesty which covered him with the cloak that only true greatness wears." These are acute stage directions from behind the scenes. John W. Davis, *Edward Douglass White*, 7 A.B.A.J. 377, 382 (1921).

One more source and I am done. This may seem a trifle to you. Each semester I walk with my seminar students to Hill Memorial Library on LSU's campus. We request a manuscript file, I forget which. It holds a small scrap of paper, a hand-penciled note to the Supreme Court's Reporter of Decisions apropos some little correction of page proof, I forget what. It is signed, "Yours E. D. White."

We realize with Holmes: "He lived."